SUBJECT INDEX.

CASES.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1918.

NO. 664.

THE HEBE COMPANY AND CARNATION MILK PRODUCTS COMPANY, CORPORATIONS,

PLAINTIFFS IN ERROR,

VS.

NORMAN E. SHAW, SECRETARY OF AGRICULTURE OF OHIO, THOMAS C. GAULT, CHIEF OF BUREAU OF DAIRY AND FOODS OF THE BOARD OF AGRICULTURE OF OHIO, AND OTHER OFFICERS AND AGENTS CLAIMING TO ACT UNDER THE AUTHORITY OF SAID THE BOARD OF AGRICULTURE OF OHIO, OR OF THE SECRETARY OF AGRICULTURE OF OHIO,

DEFENDANTS IN ERROR.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION.

BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT OF THE CASE.

In the Bill of Complaint filed in the District Court, Appellants sought to enjoin the Secretary of Agriculture of Ohio, and other officers from prohibiting the sale of

Hebe in that state. The Carnation Milk Products Company, one of the Appellants, evidently produces a grade of condensed milk which stands very high in the market. In fact it is so near natural milk that it may be used for infant food when properly modified by a physician's advice. Rec. pp. 65-66) This company is engaged in the manufacturing of milk products in Wisconsin and probably in other places, and like many other manufacturers of food, it found out that large sums of money could be made by adulterating foods if there were no laws on the subject of adulteration. It extracted from natural milk a pound of butter fat and sold it for about 37 cents (Rec. p. 55). It substituted for this, the most important ingredient of natural milk, a vegetable oil, known as cocoanut oil, which it bought at 17¾ cents per pound (Rec. p. 58), then it canned the skimmed milk and the cocoanut oil, thus saving 19¼ cents on each pound of butter fat. It condensed and canned this in a form so much like ordinary condensed milk that the public was sure to be deceived. It sold this adulterated product in Ohio and was stopped by the Secretary of Agriculture.

We have the right to assume that the Carnation Milk Products Company was too careful of its reputation to market this product in its own name and accordingly it incorporated a company under the name of The Hebe Company (Rec. p. 55), which according to the record was to sell the product, and as we have the right to presume, to divert from The Carnation Milk Company any criticism or attack levelled at the adulterated product.

The Secretary of Agriculture, after taking advice from the Attorney General of Ohio, (Rec. p. 11), stopped the sale of Hebe in Ohio because it was unlaw-

ful under the statutes of Ohio. Appellants in order to product their business of selling adulterated food in Ohio, brought a bill to restrain the Secretary of Agriculture from prosecuting the customers of Appellants or persons to whom the latter sold the products.

In their answer to the Bill of Complaint Appellees aver that the condensing of milk in the form of Hebe increases the facility with which the public may be deceived in believing that it is buying genuine condensed milk; that the nutritive quality of cream or the butter fat in milk is well and favorably known to the public and is especially known and used as the one food which alone will sustain life and produce growth; that it is therefore largely used for the purpose of nourishing infants, who receive no other food but milk; that the labels and advertisements used in connection with such products as "Hebe" in every instance contain the word "milk" at some place or in some form; that the retailers hold such product out to the public as milk; that being inferior to and cheaper than condensed whole milk, it is on account of this cheapness easy to sell to and is readily bought by the public; that if the oil substitute in such product has slight nutritive value, it is very inferior in life nourishing quality to the butter fat for which it is substituted and so much inferior that infants, fed upon the same exclusively, would starve; that the sale and scheme of such products as "Hebe" are based upon the well known value of butter fat, upon the fact that the latter is associated in the public mind with milk and upon the fact that retailers can and do easily sell such products from which the cream has been removed to the public for the genuine condensed milk; that on account of the great facility with which the public was and can be deceived in this matter and the great danger

to the health of the public and especially infant life, there was and is no way or means by which the legislature of Ohio could protect the people of Ohio, and especially infant children, from imposition and injury except by prohibiting the sale of condensed skimmed milk.

Recent scientific research supplemented by most extensive experimentation has demonstrated that the principal of growth is found in butter fat and is not present in skimmed milk or in any vegetable oil.

Appellees further deny that the Hebe is sold in every case under its distinctive name, but on the contrary aver that in the great majority of cases the retailers sell "Hebe" as condensed milk without qualification or explanation; that this fact is and was well known to appellants because even upon information they have not averred in the Bill of Complaint that "Hebe" is not sold by retailers in Ohio as and for condensed or evaporated milk.

BRIEF OF ARGUMENT.

I.

The food product "Hebe", whether a pure and wholesome product or not and whether plainly and fairly labeled or not, is within the condemnation of the legislation of the state of Ohio and may not lawfully be sold in Ohio.

Lewis' Sutherland Statutory Construction, pages 967 and 980.
Conrad vs. State, 75 O. S., 52.
U. S. vs. Hartwell, 73 U. S., 385.
State vs. Brown, 7 Oregon, 186.

Bissot vs. State, 53 Ind., 408.
Barker vs. State, 69 O. S., 68.
State v. Vause, 84 O. S., 210, 215, 216.
State vs. Coesend Creamery Co., 83 Minn., 284.
Genesee Valley Milk Products Co. vs. J. H. Jones Corporation, 143 App. Div. N. Y. 624, 626, 627.
Commonwealth vs. Boston White Cross Milk Co., 209 Mass. 30.
Hutchison Ice Cream Co. vs. Iowa, 242 U. S., 153.
Ryder vs. State of Maryland, 109 Md., 235.
General Code of Ohio, Sections 12725, 5774, 5778, 5785 and 12717.

II

The prohibition of the sale of the product "Hebe" in Ohio is not an unconstitutional interference with interstate commerce. The appellants are not entitled to be protected against interference with sales in the original packages and the prohibition of the statute is not repugnant to the Federal Food and Drugs Act.

Brown v. Maryland, 25 U. S., 419.
Leisy v. Hardin, 135 U. S., 100, 124.
Schallenberger v. Pennsylvania, 171 U. S., 1.
Purity Extract Co. v. Lynch, 226 U. S., 192.
McDermott v. Wisconsin, 228 U. S., 115.
Austin v. Tenn., 179 U. S., 343.
Cook v. County of Marshall, 196 U. S., 261.

Price v. Illinois, 238 U. S., 446.
Armour v. North Dakota, 240 U. S., 510.
Sligh v. Kirkwood, Sheriff, etc., 237 U. S., 52.
Savage v. Jones, 225 U. S., 501
Plumley v. Massachusetts, 155 U. S., 461.

III

The prohibition by the legislature of Ohio of the sale of "Hebe" in Ohio is a valid exercise of the police power of the state and is not invalid as a deprivation of liberty and property or as denial of the equal protection of the laws.

Atlantic Coast Line Railroad Co. v. State of Georgia, 234 U. S., 280-288.
Rast v. Van Deman & Lewis Co., 240 U. S., 342-357.
Armour v. People, etc., 240 U. S., 510.
Schmidinger v. Chicago, 226 U. S., 578.
Powell v. Pennsylvania, 127 U. S., 678.
Waite, et al. v. Macy, et al., 246 U. S., 606.
People v. Biesecker, 169 N. Y., 53.
In re Bresnahan, Jr., 18 Fed. Rep. 62.
Butler v. Chambers, 36 Minn., 69.
Toledo, Wabash & Western Ry. Co. v. Jacksonville, 67 Ill., 37, 40.
State v. Hanson, 118 Minn., 85.
Ex-parte Hayden, 147 Cal., 649.
Rigbers v. City of Atlanta, 7 Ga. App. Rep. 411.
Dorsey v. Texas, 38 Tex. Crim. Rep. 527.
Commonwealth v. Waite, 11 Allen, 264.

State v. Capital City Dairy Co., 62 O. S., 246. (Affirmed Capital City Dairy Co. v. State, 183 U. S., 238).
State v. Rippeth, 71 O. S., 85, 87.
Jeffrey v. Blagg, 235 U. S., 571.
German Alliance Ins. Co. v. Kansas, 233 U. S., 389.
Lindsley v. Natural Carbonic Gas Co., 220 U. S., 61.
Central Lumber Co. v. South Dakota, 226 U. S., 157.
People v. Marx, 99 N. Y., 377.
State v. Addington, 77 Mo., 110.
Powell v. Commonwealth, 114 Pa. St., 265.

IV

The bill of complaint should be dismissed for want of equity.

ANSWER TO ARGUMENT.

I.

The first argument made by Appellants in their brief is as follows:

> "The food product 'Hebe', being a pure and wholesome product, plainly and fairly labeled, is not within the condemnation of the legislation of the State of Ohio, and may be lawfully sold in said State."

The language of the statute is so plain that anyone who runs may read it. Section 12725 of the General Code is as follows:

> "Whoever * * * sells * * * condensed milk unless * * * it has been made from * * * milk, from which the cream has not been removed * * * shall be fined not less than $50.00 nor more than $200.00."

We see nothing to construe in this statute.

"Hebe" is condensed skimmed milk; it is admitted that 94% is skimmed milk. It is admitted that the cream has been removed from it and that the customers of Appellants are selling it in Ohio. The contents of Subdivision 1 of the argument in Appellants' brief from pages 15 to 37 inclusive, might be appropriate if addressed to a committee of the legislature which was determining whether we should have such legislation or not. We fail to see that it is relevant in a discussion such as ours. Counsel for Appellants cannot believe that it was intended by this section to absolutely prohibit the sale of such a wholesome and common article as condensed skimmed milk. The sale of skimmed milk is not

prohibited. There is nothing in the record to show that there is any demand in Ohio or elsewhere for condensed skimmed milk or that skimmed milk could be canned and sold for what the milk and the process cost. So far as the record shows, the people of Ohio are getting condensed milk in any quantities which they desire and the fact that the legislature has prohibited the sale of condensed skimmed milk affects no one so far as the record shows except the Appellants.

Throughout the whole case, testimony, briefs and all, we find the constant reiteration of the claim that the food product "Hebe" is pure and wholesome. We have admitted and admit now that it is pure in the sense that there is no dirt or any impurity in it, or that there is nothing in it except skimmed milk and cocoanut oil, but that does not meet the objections now before the Court and which will be fully and appropriately argued under other subdivisions. Skimmed milk lacks the important health ingredient of natural milk and no reiteration that it is pure and wholesome will make it milk or the equivalent of milk. The common experience and the common sense of mankind have established that no substitute has ever been found for butter fat. If such a substitute had been found, it would be known and used all over the world and its value would be the same as butter fat. The substitution of cocoanut oil for butter fat is the substitution of a cheaper and inferior food substance and no amount of argument can distract the attention of the Court from the actual adulteration in this case.

Preliminary to a consideration of this question, we recognize that the statute in question is a penal one and as such is to be strictly construed, but it is to be so construed in the light of another equally well settled rule of statutory construction that the primary purpose al-

ways is to ascertain and give effect to the intention of the legislature. This rule is well stated in

Lewis' Sutherland Statutory Construction, pages 967 and 980:

> "The intent of a criminal statute may be ascertained from a consideration of all its provisions and that intent will be carried into effect. Such statutes will not be construed so strictly as to defeat the obvious intentions and purposes of the legislature."

Conrad vs. *State*, 75 O. S., 52. The court says at page 59:

> "The rule as to the strict construction of penal statutes does not require us to go so far as to defeat the purpose of the statute by the technical application of the rule." Citing United States v. Hartwell, 73 U. S. 385, State v. Brown, 7 Oregon, 186; Bissot v. State, 53 Ind., 408.

The cases of *Barker* v. *State*, 69 O. S. 68, which is to the same effect, and *Conrad* v. *State*, *supra*, were cited with approval and followed by the court in the case of State v. Vause, 84 O. S. 210, 215, 216.

It is very plain that "Hebe", 94% of which is admittedly condensed skimmed milk, comes within the operation of the law quoted above.

It remains to consider the cases which counsel cite in their brief.

State v. *Crescent Creamery Co.*, 83 Minn. 284. This case, cited on pages 24 and 25, presented a set of facts to the court where no cream could be sold which contained less than 20% of fat. The court held the statute to mean that no cream could be sold as cream which contained less than 20% of fat.

To have decided otherwise in the Minnesota case would have had the palpably absurd and unjust effect of preventing the sale of milk which, of course, never contains 20% of butter fat. Therefore it was only selling the product with less percentage than 20% as cream.

The court which construes section 12725 has no such difficulty before it. The legislature of Ohio has enacted in what form and under what labeling skimmed milk may be sold to the people of Ohio. In order to prevent deception it cannot be condensed but it can be sold in an uncondensed form.

Genesee Valley Milk Products Co. v. *J. H. Jones Corporation*, 143 App. Div. N. Y. 624, 626, 627. This case was decided in 1911 by a court consisting of five judges. Two of the judges, Spring and Williams, dissented from the opinion. Judge McLennan lays down the proposition that regardless of the provisions of the New York statute, quoted by counsel on page 25, he thought it was not competent for the vendee to receive from his vendor certain property and thereafter sell such property at the market price and then in an action brought to recover the contract price, say: "I will not pay the vendor", especially when no damage has resulted to the vendee from such sale. The two remaining judges, Crews and Robeson, concurred with McLennan and the case seems to come into this discussion as an authority because McLennan, who thought that the vendee could not defend this case independent of any statute, agreed with Crews and Robeson.

Commonwealth v. *Boston White Cross Milk Co.*, 209 Mass. 30. The defendant in this case was indicted under a statute which made it a criminal offense to sell milk to which water or any foreign substance had been added. At the trial it developed that the defendant had

added water to what is known as condensed milk and the court held that when the word "milk" was used in that statute it referred to whole milk and not to condensed milk. We do not consider this any authority in our case. Water is removed from condensed milk so as to decrease the bulk and it is expected, when it is used, that water will be added to it if it is desired to restore the product to its original condition as it came from the cow.

Hutchinson Ice Cream Co. v. Iowa, 242 U. S., 153,

This case is cited by counsel at pages 27 and 28 of their brief. It appears in Iowa and Pennsylvania there were statutes which prohibited the sale of ice cream containing less than a fixed per centage of butter fat. On page 158 the court by Mr. Justice Brandeis finds as a trade fact that ice cream is shown to be a generic term, embracing a large number and variety of products, and that the term as used does not necessarily imply a use of dairy cream in its composition and that according to some formulae vanilla ice cream might be made without any cream or milk whatsoever. The court here had before it a legislative enactment with words "embracing a large number and variety of products" and it there held that the statute referred to the sale of ice cream as ice cream. The court will readily distinguish the facts in this case from the facts in our case. Skimmed milk is not a generic term, means one thing and one thing only. The legislature of Ohio in passing the law could not mean anything at all except the one thing and that was milk from which the cream had been removed. We claim, therefore, that the case of Hutchinson Ice Cream Co. v. Iowa, being the interpretation of a generic term, is not an authority in our case where the interpretation

is of a term that is not generic and embraces a single thing.

On the other hand we submit to the court case of Ryder vs. State of Maryland, 109 Md., 235, the syllabus of which is as follows:

> "Code, Article 27, section 235 (Act of 1900, Chap. 532) provides that no condensed or preserved milk shall be manufactured or sold unless it be made from pure milk, from which the cream has not been removed, either wholly or in part, nor unless it contain designated proportion of milk solids. *Held*, that this statute prohibits the sale of a product labeled as condensed skimmed milk, made from milk from which the greater part of the cream had been taken, although such product, manufactured in this manner, was not known when the act of 1900 was passed, and although Code, Article 27, Section 233, authorized the sale of skimmed milk when sold as such.
>
> "The object of the statute is not to prevent fraud or imposition, but to prohibit the sale of an article considered by the legislature to be lacking in some of the qualities of healthy food, and hence it makes no difference that the article is not sold as condensed milk, but as condensed skimmed milk."

It is impossible for anyone to affirm that the legislature intended section 12725 to be interpreted differently than what its plain language compels, that is, that the sale of condensed skimmed milk is prohibited in Ohio. A study of this statute in connection with section 12720 abundantly justifies this conclusion. By section 12720 the legislature of Ohio declares that no skimmed milk can be sold in Ohio unless upon the can or container those words were set forth in uncondensed gothic type not less than two inches long. If we adopt

the construction which counsel for appellants seek to place upon section 12725, then the legislature said that any one could sell evaporated condensed milk if they sold it as and for evaporated condensed milk. Now we all know that fraud is more easily carried out in connection with condensed milk than whole milk. Condensed milk is sealed securely in a can, the consumer buys it at the grocery and takes it home and it may be days or weeks before he uses it and then he finds out for the first time what is in the can. If appellants' construction of section 12725 is to prevail, then the legislature of Ohio has left it to the conscience of the manufacturer to say what kind of label or advertisement shall be placed upon the can of condensed skimmed milk to warn the purchaser of its character *because there is no provision in any part of the statute for the labeling of condensed skimmed milk.*

Counsel for appellants quote 12725 of the General Code of Ohio and speak of this as the only statute which was urged as establishing the unlawfulness of the sale of "Hebe" in Ohio. Counsel are mistaken in this. There are other statutes of Ohio and the sale of "Hebe" comes squarely within the condemnation of their terms.

Section 5774

> "No person, * * * shall manufacture for sale, offer for sale, sell or deliver * * * a drug or article of food which is adulterated within the meaning of this chapter."

Section 5778

> "Food * * * are adulterated within the meaning of this chapter (1) if any substance or substances have been mixed with it, so as to lower or depreciate or injuriously affect its quality,

> strength or purity; (2) if any inferior or cheaper substance or substances have been substituted wholly, or in part, for it; (3) if any valuable or necessary constituent or ingredient has been wholly, or in part, abstracted from it; (4) if it is an imitation of, or is sold under the name of another article; * * * (6) if it is colored, coated, polished or powdered, whereby damage or inferiority is concealed, or if by any means it is made to appear better or of greater value than it really is; * * *"

Under favor of section 5778 we claim that "Hebe" contains cocoanut oil, which is inferior to and cheaper than butter fat, and that the cocoanut oil has been substituted for butter fat (Rec. p. 55-58), we claim that a valuable constituent or ingredient, namely, butter fat, has been removed from it, we claim that it is an imitation of and is sold under the name of another article, to-wit, milk, we claim that it is made to appear as whole milk, which is better and of greater value than skimmed milk or cocoanut oil, or both. We think that it will be conceded that barring any further statutes or exemption, "Hebe" falls squarely within the condemnation of sections 5774 and 5778.

Section 12717 provides as follows:

> "Whoever sells * * * adulterated milk or milk to which water or any foreign substance has been added * * * shall be fined not less than fifty dollars nor more than two hundred dollars."

Here we have statute 5774 denouncing the sale of an adulterated food, statute 5778 describing what an adulterated food is, and statute 12717 fixing the penalty for selling adulterated milk.

Under what statute do we find any exemption of "Hebe", from sections 5774 and 5778? There is some language in 5785 which has been mentioned in this connection, but counsel for Appellants, on page 35 of their brief, admit that this has nothing whatever to do with adulteration.

It is relevant to say further in this connection that sections 5775 and 5778 were passed by the legislature of Ohio, substantially in their present form, on March 20, 1884 (81 O. L. 67). Section 12725 appeared in substance on May 17, 1886 (83 O. L. 178). If, as appellants contend, it was and is, except for section 12725, lawful to sell "Hebe" as a compound, the legislature had that fact before it when it passed the law making the sale of all condensed skimmed milk unlawful. When the legislature came to the enactment of 12725 it knew, if the contention of Appellants is correct, that it was lawful to sell a product of 94% of skimmed milk and 6% of vegetable oil, and yet with this knowledge, it declared in language too plain to call for interpretation, that there should never be any kind of condensed milk sold in Ohio except one and that it should be made of milk from which no part of the cream had been removed.

In conclusion, and upon the subject of "Hebe" being a compound, we submit that the relative proportions of this product cannot be urged upon any sensible mind as a compound. The court will bear in mind that this is not a product of milk and vegetable oil, but it is a product of a vegetable oil and an adulteration under the law of Ohio; in other words, a product of a vegetable oil and milk from which the cream has been removed. If a food profiteer can take a widely known and indispensible article of food such

as whole milk, withdraw its most valuable ingredient and then in order to escape the condemnation of the statute add between 1-16 and 1-17 of a foreign article to it, then it would be easy to escape all of the provisions of the food and drug act by merely adding a small percentage of some unimportant and harmless article to an adulterated product and calling it a compound.

In conclusion we claim that the sale of the product known as "Hebe" is squarely within the condemnations of statutes 12725, 5774, 5778 and 12717 and that counsel cannot add a small percentage of a foreign substance to skimmed milk and change the latter to a compound.

ANSWER TO ARGUMENT.

II

"If the legislation in question can be deemed to be applicable, the prohibition of the sale of this product in Ohio by the appellants' customers is an unconstitutional interference with interstate commerce.

The appellants are entitled to be protected against interference with their customers' sales in the original packages.

The prohibition of the statute is repugnant to the Federal Food and Drug Act."

This argument is subdivided into two parts, the first of which goes to the matter of interference with interstate commerce and the second to the matter of repugnancy to the Federal Food and Drugs Act.

We do not get clearly the position of counsel for Appellants under the first proposition. It might be inferred that their complaint is because the wholesale dealers, jobbers and distributors will be prosecuted for selling in the original packages, to-wit, the fibre shipping cases containing 48 one pound cans or 96 six ounce cans respectively, in which "Hebe" is brought into the state. If this is the only complaint they have, and if the complaint had any foundation, they did not need to come to the Supreme Court of the United States for relief. The Secretary of Agriculture will never prosecute any wholesalers, jobbers or distributors *unless they violate the law.* We supposed, and had a right to suppose, that Appellants went into this litigation for substantial results and by this we mean the right to enable their immediate purchasers to sell to retailers and thus market their product in the only

way that it can be disposed of. To this end they are trying to show that section 12725 is unconstitutional. If, however, the only claim they make is that the Secretary of Agriculture will begin suits against wholesalers, jobbers and distributors, Appellants have not made a case to this effect and they have no standing in court if they do.

In the first place the stipulations shown on pages 49, 50, 51, 52 and 65 of the record were prepared by counsel for Appellants and agreed to by Appellees. The stipulation quoted on page 39 of defendant's brief and shown on page 52 of the record is a copy of a notice served upon Appellants by the Secretary of Agriculture that "Hebe" cannot be sold or distributed in the State of Ohio from and after July 9, 1918, and if after that date said product be found upon the market, the Secretary will cause prosecutions to be brought against all wholesalers, jobbers, distributors and retailers selling the product known as "Hebe" in the State of Ohio.

The Secretary of Agriculture is not charged with the intention, without positive proof of the same, that he intended to prosecute these people unless they were violating the law. It was and is his intention to prosecute any violaters of the law. If it be found that any importer has broken his original package so as to lose the protection of the interstate commerce act, the Secretary of Agriculture would not be likely to waste time prosecuting him when he could solve the whole question by one or two prosecutions brought against retailers in different parts of the state.

Besides this, there is testimony in the case on page 49 of the record from which it may be fairly inferred

that the importers and wholesalers themselves violate the law. On page 49 we find the following stipulation:

> "And said wholesale dealers, jobbers and distributors then sell said product to retail dealers (and in some instances directly to large consumers such as restaurants and hotels) in the state of Ohio."

It must be inferred that when necessary the original packages would be broken and smaller lots sold at times; there is no evidence to the contrary.

Besides this, if their only purpose is to prevent the prosecution of wholesalers, jobbers and distributors, they fail to make out one of the necessary allegations of their bill of complaint, and that is, that there will be a multiplicity of suits. In 1915 the appellants only had three customers in the State of Ohio (record page 51) and there is no evidence that they have any more customers at the present time.

The foregoing argument is based upon the supposition that Appellants admit the one pound and six ounce cans are not original packages but that the fibre cases containing 48 cans of one pound each or 96 cans of six ounces each are the original packages. If counsel for appellants claim otherwise there is a long line of authorities which establish the contrary.

Brown v. Maryland, 25 U. S. 419;
Leisy v. Hardin, 135 U. S. 100, 124;
Schallenberger v. Pennsylvania, 171 U. S. 1;
Purity Extract Co. v. Lynch, 226 U. S. 192;
McDermott v. Wisconsin, 228 U. S. 115;

Austin v. Tenn., 179 U. S. 343;
Cook v. County of Marshall, 196 U. S. 261;
Price v. Illinois, 238 U. S. 446;
Armour v. North Dakota, 240 U. S. 510.

It seems to us that the decisions of the Supreme Court are so clear upon this subject that it is not necessary to discuss them further.

However, even if the pound and six ounce cans were the original packages, the appellants would have no standing in this court under the plea of interstate commerce.

Sligh v. *Kirkwood*, Sheriff, etc., 237 U. S. 52.

The court say on page 59:

"The power of the state to prescribe regulations which shall prevent the production within its borders of impure foods, unfit for use, and such articles as would spread disease and pestilence, is well established. * * * * * * Nor does it make any difference that such regulations incidentally affect interstate commerce when the object of the regulations is not to that end, but is a legitimate attempt to protect the people of the state."

Savage v. *Jones*, 225 U. S. 501.

"But when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidently affect interstate commerce, provided it does not conflict with legislation enacted by congress pursuant to its constitutional authority."

Plumley v. *Massachusetts*, 155 U. S. 461.

> "The statute of Massachusetts of March 10, 1891, Chapter 58, to prevent deception in the manufacture and sale of imitation butter in its application to the sales of oleomargarine, artificially colored so as to cause it to look like yellow butter, and brought into Massachusetts, is not in conflict with the clause of the constitution of the United States investing congress with power to regulate commerce among the several states."

Leisy v. *Hardin*, 135 U. S., 100, 124, is restrained in its application to the case there actually presented for determination, and held not to justify the broad contention that a state is powerless to prevent the sale of articles of food manufactured in or brought from another state, and subjects of traffic or commerce, if their sale shall cheat the people into purchasing something which they do not intend to buy, and which is wholly different from what its condition and appearance import.

Under the third subdivision of this argument we will submit the facts and testimony from the record which show that the whole plan and scheme of "Hebe" are based upon artifice and deception.

The second subdivision of this branch of the argument is based upon the alleged repugnancy of the Ohio statute to the Federal food and drugs act.

We take it from page 46 of the brief that this proposition is based upon the claim that the state of Ohio has prohibited and not attempted to regulate this product.

McDermott v. *Wisconsin*, 228 U. S. 115.

Appellants rely on this case and devote a number of pages of their brief to extracts from the opinion.

It is enough to say that in that case the state of Wisconsin ordered a federal label, properly affixed, to be removed and other labels of its own determination placed on the bottle. Thus the Wisconsin act was in direct conflict with the Federal act which covers the field.

It is not shown by any evidence whatever that the Ohio statutes are in conflict with any Federal statute and we do not understand that counsel for appellants make that claim. On page 46 they say that the officials of the Federal Department of Agriculture have held that "Hebe" is a mixture of evaporated skimmed milk and cocoanut fat and is considered to be a compound within the meaning of section 8 of the Federal act. (Record page 79). If this is the only claim that appellants make in this connection we submit that the officials of the Federal Department of Agriculture have no power to legislate and that if they had, the conclusions above mentioned are not legislation such as would cover the field and oust a state legislature from any right to legislate on the subject.

ANSWER TO ARGUMENT.

III

Appellants make their third argument in the following language:

> "The prohibition by the legislation in question, as construed by the court below, of the sale within the State of Ohio, of this product, concededly pure, wholesome and nutritious, is invalid as a deprivation of liberty and property and a denial of the equal protection of the laws, contrary to the Fourteenth Amendment."

Under this head we again meet the statement that Hebe is a pure food, wholesome and nutritious and elsewhere in the brief it is claimed that Hebe is the creation of a new product. There is no discovery of any new food here. It is simply a combination of two well known articles, adulterated or skimmed milk and a vegetable oil. Both skimmed milk and vegetable oils have been known since the dawn of history. The court will not forget, in answer to all this talk about prohibiting the sale of a pure food that the people of Ohio can get any quantity of skimmed milk and cocoanut oil which they see fit to buy. The legislature does not prevent the people from enjoying these foods. It seeks to prevent only the process of combining them in a form so that the people of Ohio will think they are buying and will buy one thing when they think they are buying another. The presumption is in favor of the constitutionality of the law and the burden is on appellants to show that it is unconstitutional. We are not required to prove even that those evils existed which the legislature believed in enacting this law.

Neither is any fancied inconvenience of the people of Ohio, in being obliged to use skimmed milk in an uncondensed form, to be weighed against the law.

Atlantic Coast Line Railroad Co. v. State of Georgia 234 U. S., 280-288.

> "But the court ruled that these 'possible inconveniences' could not affect the question of power in each state to make such reasonable regulations for any safety of passengers on interstate trains, as, in its judgment, all things considered, is appropriate and effective."

The burden of proof is on the appellants in this case to show that no set of facts can reasonably be conceived which would sustain this law, and it makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength, because it is not within the competency of the court to arbitrate in such contrariety.

Rast v. Van Deman & Lewis Co. 240 U. S. 342-357.

In other words the burden of proof is on the appellants to show that the legislature was so far wrong in enacting these statutes that the question is not even debatable.

Now what evils did the legislature seek to guard against?

In the first place skimmed milk and cocoanut oil are so prepared and sold as to make the public believe that they are getting natural milk in a condensed form, and the great sale of the product is made possible and practical by the deception which the retailers practice

upon the public and which the manufacturer knows will be practiced upon the public.

Carnation Milk as shown on Exhibit No. 15 (Record page 78) is standard milk. That is, it is whole milk from which the cream has not been removed. It may be used as an infant food if properly modified by a physician's advice, and the company advertises its brand of Carnation milk for that purpose. (Record pages 64 and 65). We learn from John L. Hutchinson's testimony (Record pages 83 and 84) of another brand of standard condensed milk called "Every Day". The testimony of Appellants' witnesses shows that evaporated or condensed milk is an article of wide use among the public and it is a fair inference that there are many different brands or trade names which indicate the various standard condensed milks on the market. Now we have before us for consideration another kind of condensed milk under the head of "Hebe" which is manufactured by the Carnation Milk Products Company. It is sold to the public in practically the same size cans as the standard milk (See Exhibit No. 10, which is a can of standard Carnation Milk, and Exhibit No. —, which is a can of Hebe milk). The labels are somewhat different but the label on Hebe milk (See Record page 3), says that this milk is suitable for coffee and cereals, for baking and cooking, all of them purposes for which whole milk is generally used and required by the buying public. In other words, the use, value and necessity of whole milk is an established fact upon which Hebe begins its work.

Is it susceptible of being used to defraud?

Charles F. Healy, one of the witnesses for Appellants and the Sales Manager of the Hebe Company,

gave some significant testimony on page 77, and his own testimony establishes the right of the legislature of Ohio to pass the law. He says

> "That they distribute Hebe thru wholesale grocers; that to the best of witness' knowledge no wholesale grocer has sold Hebe other than as Hebe; that the witness has heard of retail grocers who had possibly sold Hebe as milk just as some persons might sell some other coffee as 'Reo' coffee or corn syrup as 'molasses'; that witness has written to plaintiff's salesmen and instructed them that the best future for Hebe was to sell it for what it is as a new food product, and not as milk; that the witness has repeatedly instructed all of plaintiffs' selling representatives that Hebe is a milk compound and must be sold as such, and that he has no knowledge that it was ever sold by the plaintiffs or by their salesmen as other than Hebe or as a compound."

Then we ask the Court to examine the Bill of Complaint, and they will find that while it is voluminous and exhaustive, no statement appears there that it is not sold by retailers as and for milk.

In this connection counsel for Appellants argue with an air of triumph that when they have put an analysis or statement of the contents on the the label of Hebe, they have done all that should be required of them, and that if a baby is stunted in its growth or if hundreds of thousands of poor people buy Hebe because they think it is milk and contains butter fat, the Company is absolved from all blame. The great bulk of mankind do not read what is on labels. Food profiteers understand this. No one would ever buy a can of Hebe unless he or she had previously bought a can of Carnation or other standard condensed milk.

The cans are the same size, the general appearance is the same and the word "condensed" or "evaporated" is used in each case, and hence we find the public buying one thing for another as experience shows it has done in the past.

Now what does the record show in regard to deception in sales? On page 79 of the record Arthur W. Reynolds, a major in the Quartermaster's Department at Camp Willis, near Columbus, Ohio, testified that in August of 1916 he let a contract for *evaporated milk* to the Monypeny-Hammond Company, one of the distributing agents of Appellants in Ohio, and the Monypeny-Hammond Company sent Hebe to the soldiers at that camp. The first lot was consumed and the fraud was not discovered until the second shipment was made when it was returned. Here was one of the three distributers of the Hebe Company in Ohio (Record page 9) contracting to deliver standard condensed milk, contracting to receive pay for it, and unable to resist the temptation to make the increased profit, sending in a commodity which cost it less money than standard condensed milk, palming off on soldiers of the United States an adulterated article when they were paid for furnishing a standard article.

Edwin James, an inspector of the Department of Agriculture (Rec. p. 81) goes into a store at Ironton, Ohio, and asks the clerk if they have any condensed milk and she answers that they had the Hebe Brand and he bought two cans. On the same day he went to another grocery store at East Ironton, Ohio, and asked if they had condensed milk and the storekeeper said "Yes, sir", and in response to the question as to what brands, the grocer stated he had Hebe.

In evidence on page 82 of the Record is an issue

of the Columbus Citizen of Friday, April 21, 1916, showing the advertisement by a retail grocery store of "Hebe Milk."

It will not do for Appellants to belittle this evidence and argue that Appellees should have secured more. It was possible to secure more, but this is uncontradicted and it shows the possibility of fraud and deception in this matter and furnishes an abundant ground for the exercise of the police power by the State of Ohio. It is for the judgment of the legislators of Ohio to determine whether its people could be protected by labeling or by prohibiting the combination of two foods in a form calculated to deceive.

Fraud by the appellants and their wholesale dealers is shown in the stipulation, at the bottom of page 49 of the record. Sales are made directly to restaurants and hotels. In such places people buy and have the right to expect real milk and real butter. Instead of that, Hebe, which is inferior and cheaper and therefore an adulteration under section 5778 G. C. of Ohio is palmed off on them. The guests who eat at the table do not see or read the labels on the cans, and neither did the soldiers at Camp Willis.

The next danger which the Legislature of Ohio had to guard against was the injury to the health of its people and especially to infant life. In feeding children all the chemical compositions of cow's milk must be present in proper proportion to give normal growth and development. (Rec. p. 122). Hebe, being an adulteration and therefore cheaper, would be readily bought by the poorer classes of people and used for the purpose of feeding infants. If infants were fed upon this skimmed milk and vegetable oil, their growth would cease and if long persisted in, they would die.

The burden of proof is on Appellants to show that this state of facts is not reasonable, or in short that it is not even debatable.

Hebe is a product of skimmed milk and a vegetable oil. Dr. E. V. McCollum (pages 99 and 100 of the Record) details the results of three thousand carefully conducted feeding experiments, and has never been able to get the unknown substance (the mysterious principle of growth in milk) from any plant or vegetable oil. John L. Hutchinson testifies to the same effect on page 87 of the Record, Oscar C. Erf on page 122 and Arthur G. Helmick on pages 121 and 122. On page 61 Dr. E. J. Wilson, a witness for Appellants, says that he is not prepared to say that Hebe has been used for infant feeding, and that he does not think he would prescribe Hebe to be given to a child instead of milk. On page 60 Dr. Wilson says that Hebe contains the features and elements that *ought* to sustain life. On page 61 he says that he does not think Hebe would be an infant food, and we submit that the cross examination of Dr. Wilson alone shows enough uncertainty to warrant and sustain the action of the Legislature. Against this the Appellants were contented to rest their case upon the testimony of Curtis C. Howard, a Columbus chemist, and John A. Wesener, a Chicago chemist. It is worthy of note that the witnesses testifying for Appellees on this subject are men of high scientific attainment, who foregoing the profit which might be derived by commercializing their knowledge, see fit to continue in public service, with its notoriously inadequate rewards, giving up their lives in the quest of truth and for the benefit of humanity.

Now how stands the testimony in this particular? It devolves upon Appellants to show that the question

is not debatable. We claim that in fairness of statement, extent of research and weight of reasoning the witnesses for Appellees far surpass those for Appellants and all that we are called on to do is to show that the question is debatable.

Counsel urge that this provision is prohibitive and not regulatory. We deny this. Section 12720 of the General Code of Ohio enables the people of that state to get all the skimmed milk that they want and the danger from fraud in connection with this product was so great that the Legislature required every package containing skimmed milk to be distinctly marked in uncondensed Gothic letters not less than one inch in length. The Legislature of Ohio has made it impossible for its people to get skimmed milk in a condensed form. In other words, it enables them to get all the skimmed milk that they desire, but takes away from them the opportunity of getting it in a condensed form. If the Supreme Court of the United States has said that it is lawful to prevent the people of a state from having lard unless it is bought in cans or tubs of a certain size, (Armour v. People, etc., 240 U. S., 510), and if it has declared it lawful to prevent the people of a great city from getting bread unless it is baked in loaves of a certain size, (Schmidinger v. Chicago, 226 U. S. 578), we claim that the Legislature of Ohio is within its powers when it guards against dangers which are real in its estimation by preventing its people from getting skimmed milk in a condensed form.

Even if it were a case of prohibiting the sale of a product it is within the power of the State of Ohio to do so.

Powell v. Pennsylvania, 127 U. S. 678.

"Whether the manufacture of oleomargarine, or imitation butter, involves such danger to the public health as to require its entire suppression, rather than its regulation in such manner as to permit the manufacture and sale of articles of that class that do not contain noxious ingredients, is a question of fact and of public policy, which belongs to the legislative department to determine.

"The legislative determination of such question is conclusive upon the courts, unless it appears upon the face of the statute, or from facts of which the courts must take judicial cognizance, that the statute infringes rights secured by the fundamental law.

"Although legislation on this subject may be unwise, or unnecessarily oppressive to those manufacturing or selling wholesome oleomargarine as an article of food, yet the courts cannot interfere without usurping powers committed to another department of government; the appeal must be to the Legislature or to the ballot box, not to the judiciary."

The attempt to distinguish this case, made by counsel on page 58 of their brief, must fail. In regard to the question of prohibiting the sale of wholesome food in the Powell case, it is answered squarely by the last paragraph of the syllabus mentioned above.

A number of state cases are cited by counsel, but the only other Supreme Court case mentioned in the third subdivision of their brief is

Waite, et al v. *Macy, et al*, 246 U. S. 606.

This case, like many others cited by counsel, throws no light whatever on our controversy. It was there decided that the statute provided that tea could be excluded from import only on the ground of inferiority to

the standard in purity, quality and fitness for consumption. Tea was excluded on the ground that it contained a minute and noxious quantity of coloring matter and this was done under favor of a regulation of the secretary of the treasury.

The court found that the requirements of the statute were met and that the secretary and the board must keep within the statute. It was entirely a matter of applying the facts of the case to the statute and ignoring the rule of the secretary of the treasury, which the latter did not have the right to make.

We will briefly allude to the state cases cited by counsel.

People v. *Biesecker*, 169 N. Y., 53.

In this case the Supreme Court of New York followed the case of People v. Marx, 99 N. Y., 377, and a statute similar in form was sustained in the case of State v. Addington, 77 Mo., 110. The court in its opinion, on page 118, give the reason for their decision which may be read with profit in this case:

> "The central idea of the statute before us seems very manifest; it was, in our opinion, the prevention of facilities for selling or manufacturing a spurious article of butter, resembling the genuine article so closely in its external appearance, as to render it easy to deceive purchasers into buying that which they would not buy except for the deception."

The same statute was held constitutional in

In re Bresnahan, Jr., 18 Fed Rep., 62.

A similar statute was held to be constitutional in the case of *Powell* v. *Commonwealth*, 114 Pa. St., 265, and also in the case of *Butler* v. *Chambers*, 36 Minn. 69.

Toledo, Wabash & Western Ry. Co. v. *City of Jacksonville*, 67 Ill., 37, 40.

In this case a city ordinance was before the court and the court held that a requirement from a railroad company to keep a flagman by day and a red lantern by night at a certain street crossing when the company had only a single track, and over which only its usual trains passed and where it did not appear that such crossing was unusually dangerous, was an unreasonable requirement. This was decided on its own peculiar set of facts and gives no aid in the consideration of this question.

State v. *Hanson*, 118 Minn., 85.

As stated above, the Supreme Court of Minnesota had previously held by a full court that such a law was constitutional, and in this case by a divided court a provision of a new law which prohibited instead of regulating was held to be unconstitutional. The court divided three to two on the question.

Ex Parte Hayden, 147 Cal., 649.

This was a case where a statute required all fruit shipped to be labeled with the county and locality where the same was grown. The court found as a matter of fact that the true purpose of the act was to obtain for the fruit growers of some well advertised and favored locality an advantage for the disposition of their own fruit. This case was decided upon its peculiar facts and affords no light in our case.

Rigbers v. *City of Atlanta*, 7 Ga. App Rep., 411.

While there is considerable discussion of the general subject, we submit that in this case the court held that a municipality, under its general welfare clause,

could prohibit the sale of adulterated ice cream, but could not arbitrarily prescribe that ice cream should not be sold at all, if it contained less than a certain percentage of butter fats. We understand this to turn on the question of the construction of a certain general welfare clause in the charter of a municipality and we do not consider it authority in this case.

Dorsey v. *Texas*, 38 Tex. Crim. Rep. 527.

In this case the court of criminal appeals of the State of Texas adopts the dissenting opinion of Judge Gordon in the case of Powell v. Commonwealth, 114 Pa. St., 265.

We think that we have covered all the cases cited under this branch of the argument, but the main contention of counsel is that the legislature cannot prohibit the combination of two wholesome articles of food.

This is not the first time that such a claim has been before the court.

Commonwealth v. *Waite*, 11 Allen, 264.

The court say on page 265:

> "The defendant in this case contends that the statute is unconstitutional, because it is in derogation of common right. The substance of the argument is this: it is innocent and lawful to sell pure milk and it is innocent and lawful to sell pure water; therefore the legislature has no power to make the sale of milk and water, when mixed, a penal offense, unless it is done with a fraudulent intent. But it is notorious that the sale of milk adulterated with water is extensively practiced with fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case. They have

> seen fit to require that every man who sells milk shall take the risk of selling a pure article. No man is obliged to go into the business; and by using proper precautions any dealer can ascertain whether the milk he offers for sale has been watered. The court can see no ground for pronouncing the law unreasonable, and has no authority to judge as to its expediency."

The Supreme Court of Ohio has declared the constitutional right to enact statutes pertaining to foods, drugs and dairy products.

State v. *Capital City Dairy Co.*, 62 O. S., 246.

Affirmed in *Capital City Dairy Co.* v. *State*, 183 U. S. 238.

State v. *Rippeth*, 71 O. S., 85, 87.

We do not claim that the statutes dealing with condensed and skimmed milk were involved in those cases, but the rules which pervade those sections are similar in character to those which govern the manufacture and sale of butter, oleomargarine and other foods.

In the language of the Court below in this case:

> "They forbid the practice of fraud upon the general public. They seek to suppress false pretenses and to promote fair dealing and the public health in the selling of an article of food. They do not prohibit the manufacture and sale of all condensed milk but guarantee to consumers a pure dairy product and prevent the sale of an adulterated or deceptive article. The constitution of the United States does not secure to any one the privilege of manufacturing and selling an article offered in such manner as to induce purchasers to believe they are buying something which is in fact different from that which is offered for sale."

In regard to the alleged contravention by the Ohio statute of the 14th amendment of the Federal Constitution, a sharp line is drawn between condensed milk made in accordance with the terms of the statute and all milk produced otherwise. There is uniformity in the law and it operates equally upon all classes of people.

In the case of Jeffrey v. Blagg, 235 U. S., 571, Mr. Justice Day said (p. 576):

> "This court has many times affirmed the general proposition that it is not the purpose of the Fourteenth Amendment in the equal protection clause to take from the statutes the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it beyond the legislative authority.
>
> "That the law may work a hardship and inequality is not enough. Many valid laws from the generality of their application necessarily do that, and the legislature must be allowed a wide field of choice in determining the subject matter of its laws and what shall come within them and what shall be excluded."

In the case of Rast v. Van Deman and Lewis, 240 U. S., 342, Mr. Justice Kenna said (p. 357):

> "It is established that a distinction in legislation is not arbitrary if any state of facts reasonably can be conceived that would sustain it, and the existence of that state of facts at the time the law was enacted must be assumed. It makes no difference that the facts may be disputed or their effect opposed by argument and opinion of serious strength."

The same Justice McKenna, speaking in German Alliance Ins. Co. v. Kansas, 233 U. S. 389, said (at page 418):

> "Legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they appear and even degrees of evil may determine its exercise."

In the case of Lindsley v. Natural Carbon Gas Co., 220 U. S., 61, a case frequently cited by the Supreme Court of the United States, Mr. Justice Vandevanter said (p. 78):

> "The equal protection clause of the Fourteenth Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard."
>
> "When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed."
>
> "One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary."

In *Central Lumber Co. v. South Dakota*, 226 U. S., 157, Mr. Justice Holmes, indiscussing the power of the legislature to classify, said (p. 160):

> "It may direct its law against what it deems the evil as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not differ in kind from those that are allowed."

To sum up, the holdings of these cases may be said to be:

(a) The Fourteenth Amendment does not prevent classification of subjects of legislation.

(b) Legislation may be directed at evils as they appear, and classification may be determined by the degrees of evil.

(c). The necessity for classification is a question for the legislature, and courts should not disturb their decision, unless it appears beyond doubt that such classification is arbitrary and unreasonable.

(d) The existence of facts justifying the action of the legislature will be assumed and the burden is on the one who attacks the statute to show the opposite. Such showing must consist of more than mere difference of opinion, however serious or strongly supported.

In conclusion, under this subdivision of the argument we claim that section 12725, even if it were prohibitive, would be constitutional both on the ground of deception and danger to public health, especially to infant life, that it is not prohibitive but regulatory inasmuch as the opportunity to use skimmed milk is secured to the people of Ohio and they are denied its use only in one form and it is not shown that it would be commercially practicable or possible to manufacture or sell it in that form, that the evidence in this case clearly shows not only that the question is debatable but that the evils against which the legislature sought to protect the public were real and called for such legislation.

IV.

The Bill of Complaint should be dismissed for want of equity.

The court below said:

> "Purchasers of an article of food which may be and is used to deceive the public are not favored in courts of equity."

Appellants in this case appear, not as the manufacturers or discoverers of any new food, but come before this court with the combination of two well known commodities, one adulterated or skimmed milk and the other cocoanut oil. Nobody claims that the skimmed milk is any better than whole milk or that the cocoanut oil is any better or even equal to butter fat. It is not shown that the people of Ohio have not had abundant opportunities to get all the skimmed milk and all of the cocoanut oil which they desire. While counsel for appellants argue strenuously the merits of condensed skimmed milk and of cocoanut oil, there is nothing shown as to the value or importance of this combination. It is true that there is evidence to show that "Hebe" has had a large sale, but how is the public benefited by the combination as compared with the articles taken separately? The common sense of the court will gather from the record that the public buys this because it is similar to another article.

Carnation Condensed Milk, Every Day Condensed Milk and other brands of standard condensed milk under many names are on the market and evidently fill a want of the public. Milk is one of the most important and is certainly the most indispensable of all human foods. Being perishable in its nature, it is not always

possible to have it ready for use but the condensing or evaporating of it has done away with this difficulty. The Carnation Milk Products Co. and other great corporations have distributed their products until in hundreds and thousands of homes condensed or evaporated milk is as well known as ordinary milk.

Now a combination which, even with a label on it, will lead the people into believing that they are buying milk, must have that ready sale which every shrewd imitation will have with the buying public. It is this feature which caused the sale of "Hebe"—nothing else. If every purchaser of "Hebe" were told plainly that all of the cream had been taken out of the can and a cheaper vegetable oil substituted for it, there would not be one sale where there are thousands at the present time. The retailer knows this. The wholesaler manufactures it with this knowledge and expectation in mind. The retail grocer advertises it as "Hebe" milk in the newspaper. When asked if he has evaporated milk, the retail grocer answers "Yes", and says that he has "Hebe" brand. He buys it for less and he can sell it for less. The distributor, having a contract to sell evaporated milk to soldiers of the United States Government, can make a profit by slipping in "Hebe" because the butter fat has been drawn out of it and the milk adulterated by adding a cheaper substance. The poorer class of people will buy "Hebe" because it is cheaper, and the mother who is feeding her infant on standard condensed milk gets the principal of growth which not only nourishes the infant but promotes its growth. "Hebe" does not have this growth promoting quality in it and a child fed on it exclusively will become stunted and die. All these things are known to the manufacturer as well as to the legislature.

We therefore submit that the complainants are not in court with clean hands. They have launched a combination which is actually made an instrument of fraud and deception. Their Bill of Complaint is without equity and should be dismissed.

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